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NOTES

Leave It on the Field

TOO EXPANSIVE AN APPROACH TO EVALUATING TITLE IX COMPLIANCE IN *BIEDIGER V.* *QUINNIPIAC UNIVERSITY*?

I. INTRODUCTION

Imagine a woman who is a first-year student at a university. She loves playing softball and enjoyed four years on her high school varsity team, but she was not recruited to play in college and is unsure whether her skill level will enable her to make it onto her university's team. When she sees the announcement for walk-on tryouts posted in the gym, she shows up determined to give it her best shot. Although her skill level is not up to the standard of the majority of the women present at the tryout, she is pleased to learn that she is being offered a spot on the team. However, the coach tells her that she will only be able to practice with the team, cannot travel with the team to away games, and will not be provided with a uniform. Other candidates reject offers to join the practice squad under these conditions, but she happily accepts. She enjoys the camaraderie of a team atmosphere, loves the sport, and finds practices to be an excellent way to keep fit. Although the coach is unable to devote as much attention to her as to the women on the competition roster, the woman is satisfied with her experience and remains on the practice squad throughout the season. She is told that next year she has a good shot at making it onto the competition roster. Now imagine a court of law deciding that this woman does not count towards the university's number of female athletes for purposes of Title IX because her athletic participation is not "meaningful." Imagine the court deciding that this woman does not count because her participation is merely the product of a "false roster floor." Should the court be entitled to determine whether her

experience is meaningful? Doesn't the fact that the woman decided to accept the offer and remain on the team throughout the season indicate that her participation was meaningful?

According to the legislation's primary sponsor, Senator Birch Bayh, Title IX of the Education Amendments of 1972¹ was enacted to provide for the women of America something that is rightfully theirs: an equal chance to attend the schools of their choice, to develop the skills they want, and to apply those skills with the knowledge that they will have a fair chance to secure the jobs of their choice with equal pay for equal work.²

It is doubtful that, at the time of its enactment, Senator Bayh foresaw the enormous implications that this statute would have on collegiate athletics or the many hurdles that would arise from enforcing Title IX in that area. However, the hurdles have been countless, and new questions continue to arise regarding the avenues of compliance.³ The Office of Civil Rights (OCR) of the Department of Education is the agency tasked with the enforcement of Title IX.⁴ The OCR has issued numerous regulations to guide educational institutions' compliance efforts in the area of athletics.⁵ Most basically, the OCR has determined that Title IX requires schools that receive federal funding to provide "equal athletic opportunities for members of both sexes," which relies in part on "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes."⁶ In 1979, the OCR provided that a school would be entitled to the presumption of Title IX compliance if "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments."⁷ This "substantial proportionality" standard, the primary focus of this note, is contained in the first prong of the OCR Policy Interpretation's three-part test.⁸

¹ Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2006).

² 118 CONG. REC. 5808 (1972).

³ See, e.g., *Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957 (9th Cir. 2010); *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264 (S.D. Cal. 2009).

⁴ See *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 934 (D.C. Cir. 2004).

⁵ See *id.* at 934-35.

⁶ 34 C.F.R. § 106.41(c) (1994).

⁷ 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

⁸ *Id.*

In 2009, members and the coach of the women's volleyball team at Quinnipiac University were granted a preliminary injunction against Quinnipiac when the District Court for the District of Connecticut, in the case of *Biediger v. Quinnipiac University*, determined that the plaintiffs were likely to succeed on the merits of their claim that the university's athletics department failed to comply with Title IX.⁹ Quinnipiac maintained that the plan its athletic department intended to implement for the 2009-2010 school year would bring it into compliance under the "substantial proportionality" standard contained in first prong of the OCR Policy Interpretation's three-part test.¹⁰ Specifically, Quinnipiac anticipated that it would provide athletic participation opportunities to both sexes in numbers substantially proportional to their representation in the student body for the 2009-2010 school year.¹¹ The *Biediger* court, however, questioned whether the athletic participation opportunities for women that Quinnipiac relied upon were sufficiently "meaningful" to be counted.¹² When a roster spot reserved for a woman goes unfilled (i.e., no woman actually participates), the participation opportunity is unquestionably not meaningful.¹³ However, the *Biediger* court went further to suggest that even a roster spot that is filled might not be counted if the experience of the participant in that spot is not of a certain quality.¹⁴ The court was particularly concerned with Quinnipiac's practice of setting roster floors—allocating a certain amount of roster spots for women's teams and requiring coaches to carry no fewer than that amount of athletes.¹⁵ While the court did not go so far as to explicitly reject roster floors as a valid means of achieving Title IX compliance, it made a suggestion to that effect.¹⁶

This note will examine the reasoning and implications of the *Biediger* decision and make an argument that, regardless of the outcome on the merits, the court's reasoning represents a potentially worrisome trend. First, this note will argue that in fashioning remedies, courts should carefully balance the public

⁹ *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277 (D. Conn. 2009).

¹⁰ *Id.* at 281.

¹¹ *Id.*

¹² *Id.* at 295.

¹³ *Id.* at 297.

¹⁴ *Id.*

¹⁵ *Id.* at 296.

¹⁶ *Id.*

interest of enforcing Title IX with the interest of providing educational institutions autonomy to make their own spending decisions. Secondly, it will argue that the court in *Biediger v. Quinnipiac University* erred in taking an unprecedented subjective¹⁷ approach to evaluating Quinnipiac's compliance under the "substantial proportionality" standard of the OCR Policy Interpretation's three-part test. Specifically, the court should not have expanded its analysis to include a determination of whether the participation of female athletes was sufficiently "meaningful." Finally, this note will argue that the use of roster floors by universities should be a permissible means of complying with Title IX.

Part II will review the background of Title IX and, in particular, the OCR regulations issued to guide institutions in their compliance efforts in the area of collegiate athletics. Part III will examine the "substantial proportionality" standard of the OCR Policy Interpretation's three-part test. Additionally, the Part will discuss the facts and reasoning of the court in *Biediger v. Quinnipiac University*, and will compare that case to one of its predecessor cases, *Choike v. Slippery Rock University*. Finally, Part III will discuss the implications of the court's decision in *Biediger*, specifically as they pertain to the use of roster management policies and to the court's departure from treating the first prong of the OCR Policy Interpretation's three-part test as an almost purely objective standard.

Part IV will suggest an approach for the future for evaluating compliance based on the "substantial proportionality" standard. First, the Part will argue that courts must perform a balancing act in order to best resolve the prevalent conflict between the interests of schools in making spending decisions with regard to their own athletic programs and the public's interest in enforcing Title IX. Additionally, it will argue that the "substantial proportionality" prong should remain a largely objective standard and that the *Biediger* court improperly expanded the scope of its analysis to include a highly subjective element. Finally, it will argue that roster floors, while admittedly imperfect, should be a permissible means for schools to comply with Title IX because of the important benefits they offer.

¹⁷ For purposes of this note, a "subjective" approach with respect to the "substantial proportionality" standard refers to a court's willingness to examine an athletic participant's personal experience on a sports team, whereas an "objective" approach refers to a strictly number-based application of the standard.

II. BACKGROUND OF TITLE IX: GOALS, REQUIREMENTS, AND IMPLICATIONS FOR COLLEGIATE ATHLETICS

Title IX of the Education Amendments of 1972¹⁸ was enacted by Congress in response to an observed pattern of manifest and abundant discrimination against women in the educational arena, and was designed to prohibit “discrimination on the basis of sex in federally funded educational programs and activities.”¹⁹ As directed by Congress, the Secretary of Health, Education, and Welfare (HEW), the predecessor agency to the Department of Education, issued regulations in 1975 implementing Title IX in the area of intercollegiate athletics.²⁰ These regulations require that recipients of federal funding provide “equal athletic opportunity for members of both sexes,” compliance with which is determined by examining ten non-exhaustive factors, the first being “whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.”²¹ In 1979, the Office of Civil Rights of the HEW issued a Policy Interpretation to clarify the Title IX regulatory requirements.²² Specifically, it set out three areas to guide educational institutions in their compliance efforts: (1) equal athletic financial assistance; (2) equal treatment and benefits for athletic teams; and (3) effective accommodation of student interests and abilities.²³

With regard to the third of these areas, the OCR Policy Interpretation included a three-part test defining what constitutes “effective accommodation” of “the interests and

¹⁸ 20 U.S.C. §§ 1681-1688 (2006).

¹⁹ *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 934 (D.C. Cir. 2004). The act states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that . . .” and lays out nine standard exceptions. 20 U.S.C. §§ 1681-1688.

²⁰ 34 C.F.R. § 106.41(c) (1994).

²¹ *Id.* The other nine factors are as follows:

(2) The provision of equipment and supplies; (3) Scheduling of games and practice time; (4) Travel and per diem allowance; (5) Opportunity to receive coaching and academic tutoring; (6) Assignment and compensation of coaches and tutors; (7) Provision of locker rooms, practice and competitive facilities; (8) Provision of medical and training facilities and services; (9) Provision of housing and dining facilities and services; (10) Publicity.

Id.

²² 44 Fed. Reg. 71,413 (Dec. 11, 1979).

²³ *Id.* at 71,414.

abilities of both sexes.”²⁴ The first part, which is the focus of this note, is “[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.”²⁵ In 1980, the responsibility of Title IX implementation fell to the newly created United States Department of Education, and the 1975 regulations were re-codified but remained essentially the same.²⁶ In 1996, the OCR of the Department of Education issued a “Clarification Memorandum” on the OCR Policy Interpretation’s three-part test, accompanied by a “Dear Colleague” letter to interested parties,²⁷ which confirmed that an institution could comply with the test by satisfying any one of the three prongs, and that the three-part test “is only one of many factors that the Department examines to assess an institution’s overall compliance with Title IX and the 1975 Regulations.”²⁸

Despite these early efforts to clearly explicate an educational institution’s Title IX responsibilities with regard to athletics, shortly after the enactment of Title IX, a fundamental

²⁴ *Nat’l Wrestling Coaches Ass’n*, 366 F.3d at 935; 44 Fed. Reg. at 71,418.

²⁵ 44 Fed. Reg. at 71,418. The second part of the test is “Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex,” and the third part is:

Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id.

²⁶ *Nat’l Wrestling Coaches Ass’n*, 366 F.3d at 934.

²⁷ “Dear Colleague” letters are official correspondence generally distributed in bulk by one or more members of Congress to “colleagues of a Member, committees, officers of the two chambers, and congressional staff organizations” with the purpose of “encourag[ing] others to cosponsor or oppose a bill.” R. ERIC PETERSON, CRS REPORT FOR CONGRESS, “DEAR COLLEAGUE” LETTERS: A BRIEF OVERVIEW 1, http://digital.library.unt.edu/govdocs/crs/data/2005/upl-meta-crs-6161/RS21667_2005Jan04.pdf. The letters generally include a description of the proposed legislation along with reasons for supporting or opposing it. *Id.* at 2.

²⁸ *Nat’l Wrestling Coaches Ass’n*, 366 F.3d at 935; *see also* Dear Colleague Letter from Norma Cantu, Ass’t Sec’y for Civil Rights, Dep’t of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), <http://www.ed.gov/about/offices/list/ocr/docs/clarific.html> [hereinafter Clarification Memo]. The “Clarification Memorandum” . . . provide[s] further information and guidelines for assessing compliance under the three part test” and “contains many examples illustrating how institutions may meet each prong of the [OCR Policy Interpretation’s] three-part test and explains how participation opportunities are to be counted under Title IX.” *Cohen v. Brown Univ. (Cohen II)*, 101 F.3d 155, 167 (1st Cir. 1996).

debate—with great ramifications for college athletics—arose as to the interpretation of the phrase “receiving Federal financial assistance.”²⁹ Those who favored the “institution-wide approach” interpreted the phrase as requiring an entire institution to comply with the requirements of Title IX if any of its programs or departments received federal funds; those who favored the “program specific approach,” however, interpreted the phrase as requiring only the particular program or department receiving the funds to comply with Title IX requirements.³⁰ With the 1988 amendments to the Civil Rights Restoration Act of 1987, Congress settled the debate in favor of the “institution-wide approach,” clarifying that the terms “program or activity” and “program” within the meaning of Title IX refer to “all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education, . . . any part of which is extended Federal financial assistance.”³¹ This interpretation had “major implications for college athletics,” since universities receiving federal financial assistance in areas as distinct as research and scholarship funds were required to apply the Title IX requirements in their athletic departments.³² For example, the University of Rochester, a private research institution in New York State, received \$34.5 million in 2009 “from research programs funded by the American Recovery and Reinvestment Act.”³³ Although these federal grants “fund a broad array of scientific programs” having nothing to do with athletics,³⁴ the university’s receipt of them means that not only its science programs, but all of the university’s programs, including the athletic department, are subject to the requirements of Title IX.

Title IX provides both a complex administrative enforcement scheme, as well as a private cause of action for individuals.³⁵ The administrative scheme allows injured persons to file complaints with the Department of Education,

²⁹ See generally Brian L. Porto, Annotation, *Suits by Female College Athletes Against Colleges and Universities Claiming that Decisions to Discontinue Particular Sports or to Deny Varsity Status to Particular Sports Deprive Plaintiffs of Equal Educational Opportunities Required by Title IX*, 129 A.L.R. FED. 571 (1996).

³⁰ *Id.*

³¹ 20 U.S.C. § 1687 (2006).

³² Porto, *supra* note 29, at § 2[a].

³³ *University Receives \$34.5M in Federal Stimulus Funding*, UNIV. OF ROCHESTER NEWS (Oct. 15, 2009), <http://www.rochester.edu/news/show.php?id=3466>.

³⁴ *Id.*

³⁵ *Brust v. Regents of the Univ. of Cal.*, No. 2:07-cv-1488, 2007 WL 4365521, at *5-6 (E.D. Cal. Dec. 12, 2007).

which both investigates these allegations and periodically conducts its own “compliance reviews.”³⁶ If the Department of Education finds that an institution is in violation of Title IX, it first attempts to remedy the situation informally, and if unsuccessful, may hold an administrative hearing that could result in the termination of the institution’s federal funding.³⁷ As for the private cause of action, successful plaintiffs are entitled to a range of possible remedies, including equitable relief and compensatory damages.³⁸ Alongside the administrative scheme, Congress’s establishment of a private right of action demonstrates its intent to effect strict enforcement of Title IX.³⁹

III. THE SUBSTANTIAL PROPORTIONALITY STANDARD

A. *Challenges to the Proportionality Standard*

The first prong of the OCR Policy Interpretation’s three-part test, the “substantial proportionality” standard, has been the source of much debate, challenged both for its consistency with the language and goals of Title IX, and for its constitutionality.

1. Challenges Based on Section 1681(b)

One target of attack on the “substantial proportionality” standard has been the potential inconsistency of the first prong with Section 1681(b) of the Title IX statute.⁴⁰ Specifically, opponents of the OCR Policy Interpretation’s three-part test have argued that treating the first prong as a “safe harbor”—meaning that schools are entitled to a presumption that they are in compliance with Title IX if they can show “substantial proportionality” between their male and female athletic participation opportunities and overall enrollment—contradicts Section 1681(b)’s statement, which says that Title IX does not require

any education institution to grant preferential or disparate treatment to members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons

³⁶ *Id.* at *5.

³⁷ *Id.*

³⁸ *Id.* at *6.

³⁹ *Id.* at *5-6.

⁴⁰ See *Cohen II*, 101 F.3d 155, 174-76 (1st Cir. 1996).

of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community.⁴¹

Courts have held that the OCR Policy Interpretation's three-part test is not in fact inconsistent with Section 1681(b).⁴² For one thing, the language of the statute suggests that a proportionality standard like the one adopted in the three-part test is an acceptable, although *not mandatory*, means of complying with Title IX.⁴³ Specifically, the phrase "does not require" implies that the remedial action that is described in the words that follow is not barred by the statute; if it were, the section would be superfluous.⁴⁴ Further, the three-part test does not *require* institutions to comply with Title IX through the "substantial proportionality" standard, since it provides two other avenues of compliance, either of which is sufficient on its own.⁴⁵

2. Challenges Based on Constitutionality

Although the Supreme Court has, in such cases as *Adarand Constructors, Inc. v. Peña*,⁴⁶ rejected as unconstitutional a remedial strategy for countering discrimination that allocates employment opportunities in numbers proportional to a group's representation in the general population, courts have found that the collegiate athletics context is distinct from the employment context and thus calls for a different result.⁴⁷ In the employment context, members of both sexes are generally qualified for a given position. On the other hand, because college sports teams are generally gender-segregated (such that a man is not qualified for a women's team and vice versa), decisions regarding how many athletic opportunities will be allocated to each gender must be determined in advance.⁴⁸ Consequently, a school's strategy in using enrollment data to determine the proper allocation of its athletic opportunities is not equivalent to the type of remedial scheme rejected as a

⁴¹ 20 U.S.C. § 1681(b).

⁴² See *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 771 (9th Cir. 1999).

⁴³ See *id.*

⁴⁴ It is redundant to say something is not required when that thing is not permitted in the first place. *Id.*

⁴⁵ *Id.* at 771 n.7.

⁴⁶ 515 U.S. 200, 204-05 (1995).

⁴⁷ *Neal*, 198 F.3d at 772-73 n.8.

⁴⁸ *Id.*

quota system under strict scrutiny review in *Adarand*.⁴⁹ Under the intermediate scrutiny standard of review applied to government policies of gender classification,⁵⁰ courts have repeatedly upheld the constitutionality of Title IX and its accompanying Department of Education regulations, including the OCR Policy Interpretation.⁵¹ The OCR has made clear its intention to “provide[] institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities” in their athletic programs.⁵² As for the “substantial proportionality” prong of the OCR Policy Interpretation’s three-part test, courts have consistently held that universities can bring themselves into compliance both by increasing athletic participation opportunities for the underrepresented gender and by decreasing athletic participation opportunities for the overrepresented gender.⁵³

There have been similar arguments that the first prong of the OCR Policy Interpretation’s three-part test violates the Equal Protection Clauses of the Fifth and Fourteenth Amendments in addition to exceeding the OCR’s statutory authority by actually requiring the same intentional discrimination that Title IX forbids.⁵⁴ The supposed intentional discrimination results from requiring universities to discriminate against men without regard to interests and abilities, but rather based solely on enrollment.⁵⁵ Specifically, it has been argued that gender-conscious remedies should be

⁴⁹ *Id.* The Court in *Adarand* reviewed the constitutionality of a federal government policy under strict scrutiny analysis because the policy was one of racial classification. See generally *Adarand*, 515 U.S. 200. To survive strict scrutiny review, the government’s policy of racial classification must serve a compelling governmental interest and the means chosen must be narrowly tailored to achieve that interest. *Id.* at 227.

⁵⁰ Under the intermediate scrutiny standard, the policy of gender classification must serve an important governmental objective and the means chosen must substantially relate to the achievement of that objective. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

⁵¹ *Neal*, 198 F.3d at 772. For a discussion of cases in which Title IX and the OCR Policy Interpretation have been challenged and upheld by the judicial system, see Elisa Hatlevig, *Title IX Compliance: Looking Past the Proportionality Prong*, 12 SPORTS LAW. J. 87 (2005).

⁵² Clarification Memo, *supra* note 28.

⁵³ *Neal*, 198 F.3d at 769-70 (citing *Horner v. Ky. High Sch. Athletic Ass’n*, 43 F.3d 265, 272 (6th Cir. 1994); *Kelly v. Bd. of Trs.*, 35 F.3d 265, 269 (7th Cir. 1994); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993); *Cohen v. Brown Univ.* (*Cohen I*), 991 F.2d 888 (1st Cir. 1993)).

⁵⁴ See *Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ.*, 366 F.3d 930, 935-36 (D.C. Cir. 2004); *Neal*, 198 F.3d at 767 (appellants argued that intentional discrimination is avoided only when schools provide opportunities in proportion to interest).

⁵⁵ *Neal*, 198 F.3d at 767.

permissible only to the extent that “schools provide opportunities to males and females in proportion to their relative levels of interest in sports participation.”⁵⁶ Courts have rejected this argument, emphasizing that in light of its history, Title IX logically permits the use of gender-conscious remedies, and that these remedies should not be so limited as to render them ineffective.⁵⁷ In a 1999 case, *Neal v. Board of Trustees of California State Universities*, the Court of Appeals for the Ninth Circuit noted that although men apparently expressed a greater interest in athletic participation than women, this “interest gap” was continuously narrowing, as more and more opportunities were provided for women.⁵⁸ In *Neal*, the court discussed the *Cohen I*⁵⁹ and *Cohen II*⁶⁰ cases, which both addressed the question whether schools could comply with Title IX by making their athletic participation numbers proportional to enrollment as opposed to interest.⁶¹ The court in *Neal* reiterated the reasoning, employed in both *Cohen I* and *Cohen II*, that “a central aspect of Title IX’s purpose was to *encourage* women to participate in sports,” and that increased opportunities (such as available roster spots and scholarships) would help increase demand and dispel stereotypes that disfavored women in competitive sports.⁶² To rely on “interest” as opposed to enrollment in creating athletic opportunities for men and women, although seemingly gender-neutral, would certainly disfavor women, since “interest” in men’s athletics would begin with a significant advantage based on historical circumstances, and such a subjective method would run the risk of perpetuating stereotypes and simply maintaining the discriminatory status quo.⁶³

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Cohen I*, 991 F.2d 888 (1st Cir. 1993).

⁶⁰ *Cohen II*, 101 F.3d 155 (1st Cir. 1996).

⁶¹ *Neal*, 198 F.3d at 768.

⁶² *Id.* at 768-69.

⁶³ *Id.*

B. Relevant Cases

1. *Biediger v. Quinnipiac University*: Laying Out the Case

The first prong of the OCR Policy Interpretation recently came into focus in *Biediger v. Quinnipiac University*,⁶⁴ where the District Court for the District of Connecticut granted preliminary injunctive relief to the coach and several incoming and current members of Quinnipiac University's women's volleyball team, prohibiting the university from eliminating women's volleyball as a varsity sport for the 2009-2010 academic year pending resolution on the merits of the case.⁶⁵ In March 2009, Quinnipiac University announced that due to budgetary constraints, it planned on instituting changes to its varsity athletic programs.⁶⁶ Specifically, the university intended to eliminate three sports teams—men's golf, men's outdoor track, and women's volleyball—and to add a women's competitive cheer team.⁶⁷ The plan was the ultimate result of a 2008 directive issued by the vice president of the university to the athletic director, Jack McDonald, to make a 5%-10% cut in the athletic department budget for the 2009-2010 academic year.⁶⁸ Although McDonald's initial proposal involved a 5% budget cut without the elimination of any sports teams, the vice president rejected this proposal and specifically directed him to eliminate women's volleyball, which would free up the facility where the team played for a variety of other uses by the university, which was faced with a space crunch.⁶⁹ The amended proposal, which included the elimination of three teams and budget reductions for other varsity teams, would result in a 7% reduction of the athletic department's budget from the previous year.⁷⁰

The plaintiffs were five female athletes, all of whom planned to play on Quinnipiac's volleyball team in the 2009-2010 season, as well as the coach of the team.⁷¹ They claimed

⁶⁴ 616 F. Supp. 2d 277 (D. Conn. 2009).

⁶⁵ *Id.* at 278-79.

⁶⁶ *Id.* at 278.

⁶⁷ *Id.*

⁶⁸ *Id.* at 280, 288.

⁶⁹ *Id.* at 288.

⁷⁰ *Id.*

⁷¹ *Id.* at 279-80. Plaintiff Stephanie Biediger was a freshman and recipient of the volleyball team's Most Valuable Player award for the 2008-2009 season. She was recruited to play volleyball for Quinnipiac from her home state of Texas. Plaintiff Kaya

that the university's adoption of its proposed plan would render it noncompliant with the requirements of Title IX.⁷² In the 2008-2009 academic year, Quinnipiac had an undergraduate enrollment of 5455 students: 2089 (38.3%) men and 3366 (61.7%) women.⁷³ However, on its annual Equity in Athletics Disclosure Act (EADA)⁷⁴ report for 2007-2008, it reported athletic participation opportunities of 45% for men and 54% for women, and on its preliminary EADA report for 2008-2009, it reported 47.43% for men and 52.57% for women, percentages it conceded were not in proportion with those of the undergraduate population.⁷⁵ Further, in 2006, the university performed a "gender equity self-study," which "revealed that the school was not achieving gender equity in its athletic participation opportunities."⁷⁶ In response to this finding, the athletic department decided to implement a roster management policy in 2006.⁷⁷ Under this policy, McDonald and the senior staff of the athletic department set a roster size for each varsity team,

Lawler, also a freshman in the 2008-2009 season, was recruited for the team from her home state of Indiana. Plaintiff L.R. was a high school senior from Ohio who had been recruited to join the team in fall of 2009. Plaintiff Erin Overdevest was a senior in 2008-2009, who redshirted the season due to a shoulder injury and intended to play her final year of eligibility in 2009-2010 while completing a five-year bachelors/masters occupational therapy program at the university. Plaintiff Kristen Corinaldesi was a junior during the 2008-2009 season who intended to play as a senior in 2009-2010. Plaintiff Robin Lamott Sparks was recruited for the position of head coach of the women's volleyball team in the spring of 2007. Although her employment contract was due to expire in June 2009, she expected it would be renewed until the university announced the plan to eliminate the volleyball team. *Id.* Since the original grant of a preliminary injunction, a class consisting of "[a]ll present, prospective, and future female students at Quinnipiac University who are harmed by and want to end Quinnipiac University's sex discrimination in: (1) the allocation of athletic participation opportunities; (2) the allocation of athletic financial assistance; and (3) the allocation of benefits provided to varsity athletes" has been certified by the court. *Biediger v. Quinnipiac Univ.*, No. 3:09cv621, 2010 WL 2017773, at *1, *8 (D. Conn. May 20, 2010).

⁷² *Biediger*, 616 F. Supp. 2d at 279.

⁷³ *Id.* at 280.

⁷⁴ The Equity in Athletics Disclosure Act

requires co-educational institutions of postsecondary education that participate in a Title IV, federal student financial assistance program, and have an intercollegiate athletic program, to prepare an annual report to the Department of Education on athletic participation, staffing, and revenues and expenses, by men's and women's teams. The Department will use this information in preparing its required report to the Congress on gender equity in intercollegiate athletics.

Equity in Athletics Disclosure Act Summary, <http://www.ed.gov/finaid/prof/resources/athletics/eada.html>; see also 20 U.S.C. § 1092(e) (2006).

⁷⁵ *Biediger*, 616 F. Supp. 2d at 281.

⁷⁶ *Id.* at 283.

⁷⁷ *Id.*

and the coaches were expected to have the set number of athletes on their rosters the first day of competition.⁷⁸ According to McDonald, the roster management policy provided the benefit of being able to increase athletic participation opportunities for women without adding more sports teams by simply adding roster spots to already existing teams.⁷⁹

The university announced that its new plan was designed to reduce overall athletic spending while maintaining percentages of athletic participation opportunities for men and women in substantial proportion to its anticipated undergraduate enrollment for the 2009-2010 academic year.⁸⁰ Therefore, Quinnipiac relied upon satisfaction of the first prong of the OCR Policy Interpretation for compliance with Title IX in 2009-2010.⁸¹ The court noted that failure to meet this prong would, without a doubt, render the university noncompliant since the other two prongs were clearly not satisfied.⁸² Plaintiffs put forth several arguments to show that the university's plan would fail to achieve the substantial proportionality required by the first prong of the OCR Policy Interpretation.⁸³ The court concluded that two of these arguments—that Quinnipiac used an improper method of counting track athletes, and that competitive cheer did not qualify as a “sport” under Title IX analysis—were unlikely to succeed on the merits.⁸⁴ However, the court determined that a third argument was likely to prevail; namely, the argument that Quinnipiac did not satisfy the first prong “due to problems with its roster management policy and its reliance on setting roster floors for women's teams.”⁸⁵ Specifically, the court found that as it was being

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See id.* at 283.

⁸¹ Recall that the first prong looks to “[w]hether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments.” 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979).

⁸² *Biediger*, 616 F. Supp. 2d at 294. The court noted that the second and third prongs would not be satisfied because, by eliminating women's volleyball when there was sufficient interest to field a team, the university would fail to demonstrate a commitment to “expanding opportunities for the underrepresented gender”—the requirement of the second prong—or that it had “fully and effectively accommodated the interests and abilities of that underrepresented gender”—the requirement of the third prong. *Id.*

⁸³ *Id.* at 295.

⁸⁴ *Id.*

⁸⁵ *Id.*

employed, the roster management policy did not “produce sufficient genuine participation opportunities for women.”⁸⁶

Quinnipiac argued that its overall plan—a plan that included (1) the elimination of two men’s teams and one women’s team; (2) the elevation of one women’s team to varsity status; and (3) the continuation of roster management policies—would result in 63% women and 37% men composition of athletic participants, mirroring that of the student population.⁸⁷ It pointed to the 1996 OCR Clarification of the Policy Interpretation’s three-part test to justify these practices, specifically the Clarification’s explicit acceptance of roster management practices, “including capping participation opportunities and cutting teams, as acceptable measures to achieve substantial proportionality.”⁸⁸ The OCR Clarification also weighed in favor of the university by stating that, generally, not only would the OCR count athletes reported on a squad list on the first day of competition as participants, but it would also count those athletes who practice but do not compete with the team.⁸⁹ This was significant for Quinnipiac, since its roster management policies involved having coaches fill a predetermined number of roster spots, which were recorded by the athletic department on the first day of competition, and therefore were computed into the EADA report.⁹⁰ If some of these athletes continued to practice with the team but were no longer part of the competition roster, Quinnipiac could still count them as participants.⁹¹

The court, however, noted that the OCR Clarification Memorandum and its accompanying “Dear Colleague” letter also advised that “participation opportunities must be real, not illusory.”⁹² With this in mind, the court looked to the evidence to determine the real impact of the roster management policy as it was being used by Quinnipiac’s athletic department.⁹³ The policy, although introduced in 2006, was first enforced during the 2007-2008 season.⁹⁴ It was laid out in the athletic department’s staff manual and also discussed at the annual

⁸⁶ *Id.* at 296.

⁸⁷ *Id.* at 294.

⁸⁸ *Id.* at 296; Clarification Memo, *supra* note 28.

⁸⁹ Clarification Memo, *supra* note 28.

⁹⁰ *Biediger*, 616 F. Supp. 2d at 283.

⁹¹ *Id.* at 286.

⁹² *Id.* at 296.

⁹³ *Id.* at 283-88.

⁹⁴ *Id.* at 283.

athletic department staff meeting.⁹⁵ Both the athletic director, Jack McDonald, and the Senior Women's Administrator and Assistant Athletic Director for Compliance,⁹⁶ Tracy Flynn, testified that the reactions among coaches to the implementation of the roster management policy were negative.⁹⁷ The general response from men's team coaches was that the set roster numbers were too low in relation to their needs, and the general response from women's team coaches was that the numbers were too high.⁹⁸ While the EADA report for the 2007-2008 season indicated that the set roster numbers were adhered to so that the university achieved substantial proportionality, testimony of members of the athletic department, along with the "add/delete" lists for the 2007-2008 season, revealed that the EADA report did not tell the full story.⁹⁹ Two men's teams, baseball and lacrosse, had "deleted" team members from the roster prior to the first day of competition and then "added" them back to the team for the remainder of the season, changes that were never reflected in the EADA report provided to the Department of Education.¹⁰⁰ Similarly, several women's teams used this "add/delete" strategy to the opposite effect, adding players before the first day of competition who were subsequently cut from the team or quit.¹⁰¹ Flynn testified that such "roster manipulation" decreased in the 2008-2009 season based on the "add/delete" lists, but the testimony of McDonald and the women's softball coach, Germaine Fairchild, confirmed that it still occurred.¹⁰²

2. *Biediger*: The Outcome

It is unsurprising that the court found that if such roster manipulations were, in fact, occurring to a degree sufficient to skew the numbers so that substantial proportionality was no longer achieved, it would prevent

⁹⁵ *Id.*

⁹⁶ This position entails ensuring the university's compliance with NCAA rules and regulations; overseeing the university's budget and "add/delete" list; and along with the athletic director, compiling the annual EADA report. *Id.* at 280.

⁹⁷ *Id.* at 283.

⁹⁸ *Id.* at 283-84.

⁹⁹ *Id.* at 284.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 285.

¹⁰² *Id.* at 287.

Quinnipiac from satisfying the first prong of the OCR Policy Interpretation's three-part test.¹⁰³ As the court noted, Title IX

requires more than merely showing gender equity on the EADA report. Although an EADA report can be used to make a prima facie showing of substantial proportionately, plaintiffs are permitted to look beyond those numbers, as they have done here, to determine whether those EADA numbers actually represent genuine, not illusory, athletic participation opportunities.¹⁰⁴

The court further concluded that there was no indication that the roster manipulations would cease in the 2009-2010 season, when the university planned to institute its new plan.¹⁰⁵ If the gap between the numbers recorded on the EADA report and the actual participation numbers in 2007-2008 and 2008-2009 remained consistent in 2009-2010, then "retaining the women's volleyball team would only just restore proportionality."¹⁰⁶ The court held that this reasoning was sufficient to grant the preliminary injunction to the plaintiffs, prohibiting Quinnipiac from eliminating the women's volleyball team for the 2009-2010 season.¹⁰⁷

3. *Choike v. Slippery Rock University*

The *Biediger* court discussed one other case, *Choike v. Slippery Rock University*,¹⁰⁸ in which a court examined a university's roster management policy in making a determination on Title IX compliance.¹⁰⁹ In that case, as in *Biediger*, Slippery Rock University implemented roster management as a means of remedying its known violations of Title IX.¹¹⁰ Although the university had failed in its attempt to use roster management in the past by not including any repercussions for coaches who did not meet targets, it planned to strictly enforce the policy in the upcoming year.¹¹¹ However, for several reasons, the court found that the university's plan to achieve substantial proportionality through use of its proposed roster management plan was "too speculative at this

¹⁰³ *Id.* at 298.

¹⁰⁴ *Id.* at 297.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 298.

¹⁰⁸ No. 06-622, 2006 WL 2060576 (W.D. Pa. July 21, 2006).

¹⁰⁹ *Biediger*, 616 F. Supp. 2d at 296-97.

¹¹⁰ *Choike*, 2006 WL 2060576, at *4.

¹¹¹ *Id.*

juncture to satisfy Title IX.”¹¹² First, like the situation in *Biediger*, its use of roster management had failed in the past.¹¹³ Second, the proposed plan created many new roster spots on women’s sports teams with “no indication that the current SRU female student population would actually fill these newly created positions.”¹¹⁴ Because the set roster sizes for women’s teams were not a product of “research as to the needs or wants of the female students, but based purely on the number of positions that coaches wanted to make available to the male athletes,” the court found the new target numbers “artificial.”¹¹⁵ For example, despite the university president’s testimony that he instructed coaches not to “pad” teams with players who would not have the opportunity to meaningfully participate, the university allocated twenty-eight roster spots for women’s cross country, compared to sixteen for the men’s team, and twenty-eight roster spots for women’s soccer, compared to twenty-five for the men’s team.¹¹⁶ In sum, the court found that allocations of roster spots that achieve substantial proportionality only on paper were insufficient: “[w]hile the allocated positions might satisfy the proportionality requirement if viewed in a vacuum, compliance would not be meaningful.”¹¹⁷

4. *Biediger* and *Choike* Compared

The court’s decision in *Biediger* is consistent with *Choike* in that it too looked past the recorded numbers to reach the conclusion that substantial proportionality, and thus the requirement of the first prong of the OCR Policy Interpretation’s three-part test, required something more meaningful.¹¹⁸ Arguably, however, *Biediger* went further than *Choike* because it determined that even if Quinnipiac’s reported numbers were technically correct—in that the number of athletes reported on the EADA report accurately reflected the number of students who remained on the team throughout the season—the policy of setting roster floors could still create a Title IX compliance problem because the participation of

¹¹² *Id.* at *8.

¹¹³ *Id.* at *4.

¹¹⁴ *Id.* at *8.

¹¹⁵ *Id.* at *7.

¹¹⁶ *Id.* at *8.

¹¹⁷ *Id.*

¹¹⁸ *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 297 (D. Conn. 2009).

some of these athletes might not be “meaningful.”¹¹⁹ In other words, *Choike* suggested that the university could meet the requirement of substantial proportionality if it had a stronger basis for showing that the spots allotted to female athletes would, in fact, be filled,¹²⁰ whereas *Biediger* suggested that merely filling the spots still might not be enough to constitute “meaningful participation.”¹²¹

The court in *Biediger* acknowledged that “further evidence and analysis of Quinnipiac’s roster management policy as it affects the individual teams” would be necessary before it could make a decision on the merits as to whether the university satisfied the “substantial proportionality” standard of the first prong of the three-part test.¹²² The court adopted the view that the first prong serves as a “safe harbor” for universities, so that achieving gender parity between the body of student-athletes and the student body at large is enough for an athletic program to comply with Title IX.¹²³ However, it stressed that “the focus of prong one . . . is *genuine* participation opportunities.”¹²⁴ In this light, the court said that Quinnipiac’s roster management policy, and specifically the practice of setting roster floors, would likely fail to satisfy the first prong.¹²⁵ Although roster management policies had been deemed an acceptable means of satisfying the first prong in previous cases, the court “found no case law or other authority that sanctions the use of floors—in contrast to the use of caps,” as part of such policies.¹²⁶ According to the court, the distinction between the two was great—“[t]here is a significantly different impact on athletic participation opportunities resulting from the use of roster floors than from the use of roster caps.”¹²⁷ Specifically, while roster caps limit the number of participants, and consequently might deny opportunities to some students

¹¹⁹ See *id.* at 298 (“The plaintiffs have successfully demonstrated that the practice of setting roster floors does not correspond to an equal number of genuine athletic participation opportunities, which is what matters for purposes of complying with Title IX in spirit and in fact.”).

¹²⁰ “Unless and until SRU can demonstrate that those additional positions are meaningful—i.e., filled, they have not complied with the substantial proportionality prong of Title IX.” *Choike*, 2006 WL 2060576, at *8.

¹²¹ See *Biediger*, 616 F. Supp. 2d at 298.

¹²² *Id.* at 297.

¹²³ *Id.* at 294.

¹²⁴ *Id.* at 297.

¹²⁵ *Id.* at 298.

¹²⁶ *Id.* at 296.

¹²⁷ *Id.*

who are able and willing to meaningfully participate, roster floors require that a certain number of spots be filled regardless of whether there are enough qualified athletes to fill them.¹²⁸

The court reasoned that “players whose principal role is to provide a gender statistic” are not being provided with genuine participation opportunities.¹²⁹ The testimony of the Quinnipiac head women’s softball coach, Germaine Fairchild, supported this contention. Fairchild said that she felt pressure to accept more players than were necessary¹³⁰ and that she could reasonably accommodate, given the team’s budget and coaching resources.¹³¹ Despite this, along with her explanation that she could not provide a “legitimate Division I experience” to that many players, Fairchild received no guidance or additional support from the athletic department in order to adjust to the requirement.¹³² Further, although the 1996 OCR Clarification specified that athletes who practice but do not compete with a team are considered participants,¹³³ Fairchild’s testimony demonstrated that if these athletes were there strictly to fulfill a requirement, their participation was likely not meaningful.¹³⁴ In order to “make the numbers” in 2007, Fairchild accepted onto the team all of the athletes who tried out, but after the first day of competition, she informed several of them that they would be on the “practice squad,” and therefore would not have uniforms and could not travel with the team.¹³⁵ She testified that nine players quit the team over the course of the next several months, bringing the roster size down to seventeen, a reduction of over one third of the initial roster, for the start of the competitive spring season.¹³⁶

C. *Implications of Biediger*

Arguably, the willingness of the *Biediger* court to look beyond the numbers in the manner it did represents a decrease in the security of the “safe harbor” prong of the OCR Policy

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ The roster floor was set at twenty-five players, though Fairchild usually carried a squad of sixteen to eighteen. *Id.* at 285.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Clarification Memo, *supra* note 28.

¹³⁴ *Biediger*, 616 F. Supp. 2d at 285, 298.

¹³⁵ *Id.* at 286.

¹³⁶ *Id.*

Interpretation's three-part test. This is significant because the "substantial proportionality" standard is the "least subjective of the three compliance avenues monitored by the Office for Civil Rights."¹³⁷ The court made a compelling argument as to why roster floors may pose a problem with regard to providing *genuine* athletic opportunities to both sexes under the requirement of the first prong. However, in doing so, it chose to examine the quality of the participation in a manner that courts have not previously utilized when considering the "substantial proportionality" standard. Although the court noted that the specific practice of setting roster floors—in contrast with roster management policies in general—had never been authorized by the courts,¹³⁸ the use of both floors and caps has become a common practice among National Collegiate Athletic Association (NCAA) programs.¹³⁹ The trend is consistent with what the court found had occurred at Quinnipiac—namely, (1) that men's team coaches "often fe[lt] . . . restricted," forced to make cuts where they otherwise would not; and (2) that women's team coaches "face[d] having to convince more players to fill roster spots," where "the additions may not possess the talent or desire of their teammates."¹⁴⁰ In response to the criticism that "roster management is simply making more room on the bench for female athletes," a former collegiate athletic administrator and NCAA lecturer on the subject of roster management, Elaine Driedame, has advised that when it is well implemented, roster management need not have this effect, at least not to a significant degree.¹⁴¹ However, Driedame acknowledges successful implementation of roster management depends on focusing more on controlling roster sizes of men's teams than on imposing roster floors on women's teams.¹⁴² That said,

¹³⁷ Paul Steinbach, *Count on It*, ATHLETIC BUS. (Oct. 1, 2000), <http://www.athleticbusiness.com/articles/default.aspx?a=55&template=print-article.htm>.

¹³⁸ *Biediger*, 616 F. Supp. 2d at 296.

¹³⁹ See Steinbach, *supra* note 137; Michael L. Kasavana, *Roster Management Not a Means to Equitable Ends*, NAT'L COLLEGIATE ATHLETIC ASS'N FAC. VOICE (Aug. 28, 2000, 11:23 AM), <http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/ncaa+news/ncaa+news+online/2000/editorial/roster+management+not+end+to+equitable+means+-+8-28-00> (2000). As the athletic department at Quinnipiac had done, the common practice seems to be to set target roster numbers for each team that serve simultaneously as "floors" and "caps," with women's teams tending to view the targets as the former and men's teams, the latter. See Kasavana, *supra* note 139; Steinbach, *supra* note 137.

¹⁴⁰ Steinbach, *supra* note 137.

¹⁴¹ *Id.*

¹⁴² *Id.*

Driedame supports a limited amount of “padding” women’s teams with additional players—for example, a soccer squad of thirty or thirty-five as opposed to twenty-eight or thirty—so long as these additions come with the appropriate coaching resources.¹⁴³ She suggests that teams forced to carry additional players take measures such as beginning the season earlier to stimulate enthusiasm among women who will likely see little playing time, and notes that athletes are more likely to remain on the team if they feel they are receiving adequate attention and are improving.¹⁴⁴

Driedame’s remarks are particularly insightful with regard to *Biediger* in light of the testimony of Quinnipiac’s women’s softball coach, Germaine Fairchild, regarding her experience with the university’s roster management policy. Fairchild was required to take at least twenty-five players on her team, which represented almost a 40% increase over the size of her typical roster.¹⁴⁵ The dramatic increase in players, however, did not come with an “increase in budget, extra equipment, additional assistant coaches, or a raise in salary to account for and/or accommodate the extra players.”¹⁴⁶ Further, Fairchild testified that the target roster number for her team was set without her input as to what was reasonable, and that she was provided with no further guidance on how to manage under the policy.¹⁴⁷ Even Quinnipiac’s athletic director Jack McDonald testified that decisions about roster sizes were made with little input from coaches, “except in the case of ‘like’ sports, such as men’s and women’s soccer, whose coaches were asked to agree on similar roster sizes.”¹⁴⁸ The athletic department also made these decisions without considering the average roster sizes of teams in Quinnipiac’s athletic conference, instead only relying on the average roster sizes for all of the NCAA.¹⁴⁹ Thus, Quinnipiac’s approach to implementing a roster management policy contradicted Driedame’s advice that before mandating

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 285 (D. Conn. 2009).

¹⁴⁶ *Id.* at 285-86. Fairchild gave a specific example to illustrate how her resources were unreasonably strained. Under NCAA regulations, her athletes were permitted to do two hours of skills training per week during the off-season, which were previously spent one-on-one with Fairchild. With twenty-five players, Fairchild could not spare the fifty hours per week to continue this training program and still fulfill her other coaching responsibilities, such as office work. *Id.*

¹⁴⁷ *Id.* at 285.

¹⁴⁸ *Id.* at 283.

¹⁴⁹ *Id.*

any numbers, athletic department heads should “discuss the facts” with the coaches.¹⁵⁰ Overall, there are strong arguments for upholding roster management policies, including both roster caps and floors, as part of schools’ Title IX compliance efforts. However, as *Biediger* illustrates, athletic departments should be vigilant to ensure that these policies both comply with the statute and succeed in practicality.

IV. SUGGESTED APPROACH FOR THE FUTURE

A. *Courts Should Balance the Interests in Enforcing Title IX Compliance*

One cannot deny the glaring evidence of gender discrimination in education that prompted Congress to enact Title IX. Nor can one deny the impact the statute has had in remedying such discrimination, especially in the area of athletics.¹⁵¹ However, it is risky to empower both the federal government and the courts with authority over the affairs of educational institutions, and Title IX decisions concerning collegiate athletics have been particularly controversial.¹⁵² In recent years, some have suggested that the law, at least as it pertains to college athletic programs, is outdated.¹⁵³ As such, although Title IX was an appropriate remedy in 1972, Congress should now take a new approach that accounts for women’s increased participation in sports.¹⁵⁴ As one Delaware University student-athlete argued, “[n]ow that women’s sports are the norm for college campuses, it should be up to those institutions which sports and how much of them their community needs.”¹⁵⁵ On the other hand, there is significant evidence that gender

¹⁵⁰ Steinbach, *supra* note 137.

¹⁵¹ For extensive statistical data on Title IX and athletic participation, see *Teaching Title IX, NCAA Participation and Economic Data, Women in Athletics Facts and Resources*, NAT’L COLLEGIATE ATHLETIC ASS’N (2005), <http://www.ncaa.org/wps/ncaa?key=/ncaa/ncaa/about+the+ncaa/diversity+and+inclusion/gender+equity+and+title+ix/teaching+t9+web+page>.

¹⁵² For a discussion of many of the controversial cases in this area, see Donald E. Shelton, *Equally Bad Is Not Good: Allowing Title IX “Compliance” by the Elimination of Men’s Collegiate Sports*, 34 U. MICH. J.L. REFORM 253 (2001).

¹⁵³ See, e.g., Alyssa Benedetto, *College Athletics Affected by Title IX*, UNIV. OF DEL. REV. (Nov. 19, 2007), <http://www.udreview.com/2.1979/college-athletics-affected-by-title-ix-1.138104>.

¹⁵⁴ See *id.*; see also Andrew Santillo, Comment, National Wrestling Coaches Association v. United States Department of Education: *The Potential Takedown of the Current Application of Title IX to Intercollegiate Athletics*, 13 TEMP. POL. & CIV. RTS. L. REV. 187 (2003).

¹⁵⁵ See Benedetto, *supra* note 153.

discrimination, although diminished, continues to exist in collegiate athletics and that Title IX remains essential to push schools toward equality.¹⁵⁶ Therefore, strictly enforcing Title IX remains a strong public interest. As a result, courts must perform a balancing act when enforcement of this interest relies on universities that make autonomous spending decisions.

1. The Reality of Budget Restrictions

Much of the resentment surrounding Title IX and collegiate athletics has stemmed from the fact that many universities have eliminated sports teams in their efforts to comply with Title IX and the regulations of its enforcement agency.¹⁵⁷ When athletic opportunities are taken away from students, it is not as satisfying to celebrate their gender equality. While adding teams for the underrepresented gender seems to be an equally strong option for bringing schools into compliance under the “substantial proportionality” standard of the first prong, it is important to remember that university athletic departments are limited by budget restrictions.¹⁵⁸ Perhaps the biggest advantage of roster management policies is their potential to help bring universities into compliance with the first prong without taking more drastic measures, such as eliminating or adding teams.¹⁵⁹ However, as *Biediger* illustrates, roster management is sometimes used in conjunction with other measures, such as cutting teams, in an attempt to achieve substantial proportionality when faced with a budget crunch.

For better or worse, education in the United States has become highly intertwined with college athletics, and for many schools, athletic programs are a big business.¹⁶⁰ This is particularly true for universities whose sports teams compete in the NCAA Division I, the highest level of intercollegiate competition.¹⁶¹ Although some argue that the resources devoted to collegiate athletic programs are excessive, “[f]or most

¹⁵⁶ See Lexie Kuznick & Megan Ryan, *Changing Social Norms? Title IX and Legal Activism*, 31 HARV. J.L. & GENDER 367, 368 (2008).

¹⁵⁷ See Benedetto, *supra* note 153.

¹⁵⁸ See Steinbach, *supra* note 137.

¹⁵⁹ See *id.*

¹⁶⁰ See MaryJo Sylwester & Tom Witosky, *Athletic Spending Grows as Academic Funds Dry Up*, USA TODAY, Feb. 18, 2004, at 1A.

¹⁶¹ See *id.*; see also *What's the Difference Between Divisions I, II, and III*, NAT'L COLLEGIATE ATHLETIC ASS'N (Feb. 1, 2007), http://www.ncaa.org/wps/portal/ncaahome?WCM_GLOBAL_CONTEXT=/ncaa/ncaa/about+the+ncaa/membership/div_criteria.html.

schools, the decision to maintain—or even grow—athletic programs is unquestioned because of the perceived benefits to the campus as a whole.”¹⁶² These “perceived benefits” derive from the image of having major sports teams associated with a university’s name, which gives the institution a higher profile.¹⁶³ Although universities with athletic departments in all three NCAA Divisions maintain programs at least to some degree for direct benefit of student-athletes,¹⁶⁴ Division I programs in particular emphasize the experience of the spectators.¹⁶⁵ Given the “business” aspect of athletics at many of these schools, a conflict often arises between the need to comply with Title IX, on the one hand, and the pressure to make profitable decisions for the university regarding how many and which sports teams to support, budget allotment, and controlling roster sizes, on the other.

2. Cases Illustrating the Conflict

An example of this type of conflict was illustrated in a 1993 case, *Favia v. Indiana University of Pennsylvania*, in which the court issued a preliminary injunction against Indiana University of Pennsylvania based on its finding that the university had violated Title IX by cutting certain women’s teams.¹⁶⁶ Specifically, the court found that the university failed to satisfy either the “substantial proportionality” prong or the other two prongs of the OCR Policy Interpretation’s three-part test.¹⁶⁷ The vice president of student affairs gave testimony regarding the “importance of football and men’s basketball in terms of prestige and of their being important factors in attracting the attention of potential students.”¹⁶⁸ Although the court said it sympathized with the university’s position and understood both that football was an expensive sport to fund

¹⁶² Sylwester & Witosky, *supra* note 160.

¹⁶³ *Id.*

¹⁶⁴ There are many significant benefits to be gained from participation in intercollegiate athletics. The *Choike* court described these benefits with regard to the irreparable harm a group of women plaintiffs would face if their sports teams were eliminated: “[T]hey develop skill, self-confidence, learn team cohesion and sense of accomplishment, increase their physical and mental well-being, and develop a lifelong healthy attitude.” *Choike v. Slippery Rock Univ.*, No. 06-622, 2006 WL 2060576, at *9 (W.D. Pa. July 21, 2006).

¹⁶⁵ See *What’s the Difference Between Divisions I, II, and III*, *supra* note 161.

¹⁶⁶ *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578 (W.D. Pa. 1993).

¹⁶⁷ *Id.* at 584-85.

¹⁶⁸ *Id.* at 582.

and that, due to its large roster, it was largely responsible for the imbalance in the male-to-female athlete ratio, it stated bluntly that these facts did not get the university off the hook: “Title IX does not provide for any exception to its requirements simply because of a school’s financial difficulties. In other words, a cash crunch is no excuse.”¹⁶⁹ The fact that football teams typically carry very large rosters consistently creates a challenge for schools that have such teams; because it is rare for any women’s team to carry a roster comparable in size, it usually takes multiple women’s teams to offset these numbers.¹⁷⁰ However, as the *Favia* court made clear, Title IX makes no exceptions to account for such challenges.¹⁷¹ Further, the “substantial proportionality” prong refers only to numbers of individual athletic participants, not to the ratio of men’s teams to women’s teams offered by a university.¹⁷²

Courts have rightly held that the public interest is served by promoting compliance with Title IX.¹⁷³ However, a university has reason to argue that it is in a better position than the courts “to decide both which intercollegiate sports best meet the needs and interests of its own students, and how to allocate resources during a difficult economic time.”¹⁷⁴ In *Choike*, Slippery Rock University made a similar public policy argument against the injunctive relief sought by the plaintiffs—namely, to order the university to reinstate the women’s swimming team and women’s water polo team for the 2006-2007 academic year.¹⁷⁵ The argument was that the public interest was best served by the university using its federal funds to “support the essential academic functions of a public university, and thereby encourage a wide and diverse range of academic disciplines and degree programs, rather than provide a specific, extracurricular athletic opportunity for a small number of individual students.”¹⁷⁶ The court agreed with this argument but stated that it was nonetheless impermissible for

¹⁶⁹ *Id.* at 583.

¹⁷⁰ *See id.*; *see also* Tom Farrey, *Football Grabs Stronger Hold on Purse Strings*, ESPN.COM (Feb. 25, 2003), <http://espn.go.com/gen/s/2003/0225/1514457.html>.

¹⁷¹ *Favia*, 812 F. Supp. at 583.

¹⁷² *Id.* at 584-85.

¹⁷³ *See, e.g.*, *Barrett v. W. Chester Univ. of Pa.*, No. 03-CV-4978, 2003 WL 22803477, at *15 (E.D. Pa. Nov. 12, 2003).

¹⁷⁴ *Id.*

¹⁷⁵ *Choike v. Slippery Rock Univ.*, No. 06-622, 2006 WL 2060576, at *10 (W.D. Pa. July 21, 2006).

¹⁷⁶ *Id.* (citation omitted).

the university to provide extracurricular opportunities (if it chose to provide them) in disproportionately large numbers to men.¹⁷⁷ The court also noted that if the university implemented a plan that brought it into compliance with Title IX, such as a roster management policy that it could demonstrate actually worked, it might be permitted to eliminate the women's swimming and women's water polo teams.¹⁷⁸ In this way, the court made it clear that its ruling was not meant to impose a specific plan upon Slippery Rock University's athletic department, therefore depriving it of its choice as to what sports teams to field and fund, but rather to prevent the university from taking steps to bring it further out of compliance with Title IX.

Despite the *Choike* court's statement that it "[did] not mean to minimize SRU's valid concern of judicial interference with its independence in deciding how to allocate its limited financial resources,"¹⁷⁹ it easily concluded that the estimated \$65,000 it would cost the university to maintain the women's swimming and women's water polo teams for the 2006-2007 academic year was "minimal" compared to the potential harm to the plaintiff athletes if their teams were eliminated.¹⁸⁰ Notably, in this instance, Slippery Rock University's athletic department had not haphazardly chosen to eliminate some of its women's sports teams. In fact, five of the eight teams that were eliminated as part of the budget-reducing plan were men's teams, and the decisions were based on "a spreadsheet with a set of criteria by which all 23 teams would be assessed and ranked."¹⁸¹ These criteria "included both financial data . . . and non-financial evaluative measures, such as how competitive each team was, the academic performance of the student-athletes, the quality of the coaching staff, and the condition of the facilities."¹⁸² Missing from the university's spreadsheet, despite

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at *9.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at *10. In a similar circumstance involving judicial override of a university's decision as to how to use its resources, the *Biediger* court, in assessing potential harm to a university by granting a prohibitory injunction, stated that it was "unconvinced that the 'space crunch' at Quinnipiac [was] so severe that the University would be unable to accommodate the volleyball team's practice and competition schedule on the Burt Kahn Court where they currently play[ed], or to make other arrangements for the team." *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 293 (D. Conn. 2009).

¹⁸¹ *Choike*, 2006 WL 2060576, at *3.

¹⁸² *Id.*

recommendations by the University Athletic Council that they be included, were considerations about gender equity and Title IX compliance.¹⁸³ Further, the university president deliberately disregarded the University Athletic Council's advice on this matter because "he wanted to keep financial decisions completely separate from Title IX decisions."¹⁸⁴

3. Achieving the Balance

As *Choike* and other cases illustrate, the desire to keep financial considerations distinct from Title IX decisions is wholly unrealistic. Decisions made in order to comply or maintain compliance with Title IX are oftentimes not financially convenient for a university, and may even be financially injurious. The bottom line is that schools must accept this reality and courts should not accept the "budget crunch" excuse to gender discrimination. At the same time, when fashioning remedies, courts should keep in mind the OCR's intention to "provide[] institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities" in their athletic programs.¹⁸⁵

Courts have recognized the importance of allowing schools to maintain a degree of autonomy in making funding decisions. For instance, in a case in which state university students challenged as unconstitutional the school's refusal to fund certain religious-oriented activities out of its segregated fee account, the court noted "that it would not be in the public interest to enter a permanent injunction that compels the university to fund, or prohibits the university from refusing to fund, any particular category of activity."¹⁸⁶ Likewise, courts have employed "balancing of interests" approaches in related contexts. For instance, in fashioning remedies under the Individuals with Disabilities in Education Act, courts often balance the interests of a school district, taking into account its use of resources, with the interests of the disabled student and his or her family.¹⁸⁷ We are at juncture where great strides have been made, and yet significant action remains necessary to

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Clarification Memo, *supra* note 28.

¹⁸⁶ *Roman Catholic Found. v. Regents of the Univ. of Wis.*, 578 F. Supp. 2d 1121, 1140 (W.D. Wis. 2008).

¹⁸⁷ *See, e.g., Ferren C. v. Sch. Dist. of Phila.*, 595 F. Supp. 2d 566, 578-80 (E.D. Pa. 2009).

eliminate gender discrimination in sports and where schools face unprecedented budgetary constraints.¹⁸⁸ Especially given these circumstances, courts must balance competing interests to enforce Title IX effectively while minimizing judicial interference in the functions of educational institutions.

B. The Substantial Proportionality Standard and the Meaningful Participation Requirement Should Remain Objective

In *Choike*, the real trouble for Slippery Rock University was that it was aware that it had not been compliant with Title IX at least from 2001 through 2005 (either in achieving substantial proportionality or in satisfying the other requirements of the OCR's regulations)¹⁸⁹ and that it eliminated women's sports teams.¹⁹⁰ In other words, knowing that a disproportionately small number of its athletic participants were women, it still took measures that worked to aggravate, rather than rectify, the situation. The court granted a preliminary injunction in *Biediger* for virtually the same reasons.¹⁹¹ Furthermore, in *Choike*, as in *Biediger*, the university was relying on a roster management policy as an integral part of the overall plan to bring it into compliance with Title IX and, specifically, with the "substantial proportionality" standard of the first prong.¹⁹² However, in both cases, the courts found that the roster management policies as implemented did not provide the "meaningful participation" required by the first prong.¹⁹³ Specifically, both courts found that athletic participation opportunities were offered in numbers substantially proportional to the gender compositions of the schools' student bodies *only on paper*.¹⁹⁴

¹⁸⁸ See generally Alex Johnson, *US Schools in 'Category 5' Budget Crisis*, MSNBC.COM (Mar. 18, 2010), <http://www.msnbc.msn.com/id/35883971/> (discussing how the recession has led to a nationwide slashing of state education budgets); Graham Watson, *Programs in Precarious Position*, ESPN.COM (July 14, 2009), <http://sports.espn.go.com/ncaa/news/story?id=4313320> (explaining how the economic crisis has led to cuts in men's and women's athletic programs).

¹⁸⁹ A consultant group hired by the university to perform a Title IX compliance report also found that "SRU was not compliant with Title IX with respect to the provision of financial assistance, equipment, uniforms, facilities, coaching recruitment funds and publicity as it related to women." *Choike*, 2006 WL 2060576, at *2.

¹⁹⁰ *Id.* at *3.

¹⁹¹ *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 298 (D. Conn. 2009).

¹⁹² *Choike*, 2006 WL 2060576, at *4-5.

¹⁹³ *Biediger*, 616 F. Supp. 2d at 298; *Choike*, 2006 WL 2060576, at *3.

¹⁹⁴ See sources cited *supra* note 193.

In *Choike*, the problem that prevented participation opportunities from being “meaningful” was that the university provided no evidence that it had the ability to fill all of the roster spots it allotted to women’s teams.¹⁹⁵ In *Biediger*, the roster management policy created more complex impediments to achieving “meaningful participation.” In the years since implementation, women tried out for the teams in sufficient numbers to fill the set roster spots.¹⁹⁶ However, many of the women who represented the “extra” roster spots—added through the roster management policy—did not remain on the team throughout the season; rather, the coaches either cut them or they chose to leave.¹⁹⁷ Understandably, the court concluded that regardless of what the EADA reports showed, women who did not remain on a team for a significant portion of the season were not “meaningful” participants.¹⁹⁸ The concerning aspect of the court’s opinion is its assertion that even if the women remained on the team throughout the season, their participation might not be “meaningful” such that they would count as participants for purposes of the first prong of the OCR Policy Interpretation’s three-part test.¹⁹⁹ The OCR has specifically said that athletes who only practice with, but do not compete on, a team may be counted as participants for purposes of Title IX.²⁰⁰ It should not be the court’s role to decide if an athlete who has chosen to remain on a team, whether on the competition roster or in a practice-only capacity, is a meaningful participant in athletics. The fact that an athlete has made the decision to remain on the team signifies that the experience is “meaningful” enough to her to justify her commitment to the team. How meaningful a judge perceives that personal experience to be should not factor into the equation. In other words, it should not be the role of a court to examine the *quality* of an athlete’s participation in determining whether to count that athlete for purposes of compliance with the “substantial proportionality” standard.

If courts were to take the activist approach implied in *Biediger*, what factors would they use in determining whether the quality of participation met the threshold for being

¹⁹⁵ *Choike*, 2006 WL 2060576, at *8.

¹⁹⁶ *Biediger*, 616 F. Supp. 2d at 286.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 297.

¹⁹⁹ *Id.* at 296.

²⁰⁰ Clarification Memo, *supra* note 28.

“meaningful”? Arguably, this approach would create confusion and lead to arbitrary results. The 1979 OCR Policy Interpretation laid out three specific areas to help guide institutions in their compliance efforts: equal athletic financial assistance, equal treatment and benefits for athletic teams, and effective accommodation of student interests and abilities.²⁰¹ The OCR Policy Interpretation included the three-part test in order to define what constitutes the third of these areas, effective accommodation of students’ interests and abilities.²⁰² Therefore, regardless of whether, or how, an institution complies with the OCR Policy Interpretation’s three-part test, it is still required to show compliance in the other two areas: equal athletic financial assistance, and equal treatment and benefits for athletic teams.²⁰³ Presumably, factors such as the amount of financial assistance and the treatment and benefits afforded an athletic team would affect how “meaningful” participation is for the athletes on that team. However, these factors are considered independently of the OCR Policy Interpretation’s three-part test and should play no role in an assessment of whether an institution satisfies the first prong of that test, the “substantial proportionality” standard. The first prong is intended to be an objective standard, and despite the arguments against it being considered a “safe harbor,” there are important reasons why it should remain objective.

C. *The Biediger Court Should Not Have Expanded the Scope of Analysis Under the Substantial Proportionality Prong*

As this part of the note has already discussed, Title IX compliance can impose significant challenges for universities by requiring them to use what are often limited financial resources for athletic programs in ways that do not necessarily maximize financial gain and in ways that inevitably leave certain parties dissatisfied.²⁰⁴ Despite these challenges, Title IX has proven instrumental in providing more equitable collegiate athletic opportunities for women, who were largely excluded from such opportunities for many years.²⁰⁵ Therefore, the

²⁰¹ 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979).

²⁰² Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 935 (D.C. Cir. 2004); 44 Fed. Reg. at 71,414.

²⁰³ See *supra* note 28 and accompanying text; see also 34 C.F.R. § 106.41(c) (2003).

²⁰⁴ See *supra* note 185 and accompanying text.

²⁰⁵ See generally Kuznick & Ryan, *supra* note 156.

statute and its regulations continue to have great importance in this arena, and the challenges they impose upon universities are justified by the rewards. Nevertheless, universities serve extremely important functions beyond their athletic programs, and their ability to execute these functions is compromised when they become embroiled in litigation. OCR's pattern of regulations, interpretations of those regulations, and clarification memoranda regarding Title IX in the area of collegiate athletics indicates its intention to guide institutions in their efforts by clearly defining their responsibilities.²⁰⁶ The phrase "[e]ffective [a]ccommodation of student[s'] [i]nterests and [a]bilities"²⁰⁷ is an ambiguous standard. The OCR apparently recognized this ambiguity in its adoption of the three-part test. Within that test, the OCR rightfully included a largely objective standard, the "substantial proportionality" standard, which would allow universities to work toward the clear and comprehensive goal of providing participation opportunities for male and female students in numbers substantially proportionate to their respective enrollments, and therefore would entitle them to a presumption that effective accommodation has been satisfied.²⁰⁸ The OCR's 1996 Clarification Memorandum also stated, as the *Choike* and *Biediger* courts noted, that the "participation opportunities must be real, not illusory."²⁰⁹ The *Choike* court went on to say that the participation opportunities had to be "meaningful" but explicitly defined meaningful in this situation as "filled" with actual athletes.²¹⁰ The *Biediger* court used the word "genuine" as a contrast to "illusory" yet went further than *Choike*, suggesting that "filled" might not be enough to satisfy the requirement.²¹¹ In terms of analysis under the first prong of the OCR Policy Interpretation's three-part test, the *Biediger* court should not have gone further than *Choike* by entering the territory of examining the *quality* of an athlete's personal experience to determine whether it was sufficiently "genuine." Regardless of the outcome of this particular case on the merits,

²⁰⁶ For a summary of these Title IX compliance requirements, see *Requirements Under Title IX of the Education Amendments of 1972*, U.S. DEPT OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (last updated Mar. 14, 2005).

²⁰⁷ 44 Fed. Reg. at 71,417.

²⁰⁸ Clarification Memo, *supra* note 28.

²⁰⁹ *Id.*

²¹⁰ *Choike v. Slippery Rock Univ.*, No. 06-622, 2006 WL 2060576, at *8 (W.D. Pa. July 21, 2006).

²¹¹ *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 297 (D. Conn. 2009).

however, courts should refrain from expanding analysis under the “substantial proportionality” standard in this manner.

D. Roster Floors Should Be Permitted

The *Biediger* court held that the plaintiffs were likely to succeed on the merits because “[e]ither one of those problems—inaccurate roster numbers or setting false roster floors—is sufficient to knock Quinnipiac out of compliance with Title IX.”²¹² The court’s reference to “false” roster floors indicated the policy required coaches to take more athletes on a team than they would otherwise choose based on the needs and resources of the team.²¹³ In one regard, the court in *Biediger* was justified in looking with a critical eye at roster floors as part of a university’s roster management policy. It is clear why the use of roster floors raises a red flag in terms of the potential for reported numbers that are not backed by actual athletes; there can be little doubt that participation opportunities that only exist on paper are illusory. The court in *Biediger* noted that there was no case law in which the use of roster floors specifically had been upheld.²¹⁴ While the court did not commit to a blanket prohibition on roster floors as a means of complying with Title IX, it certainly came close: “Even if Quinnipiac’s roster numbers are accurate, it still has a problem complying with Title IX because it relies on a roster management policy of setting roster floors.”²¹⁵ In fact, Quinnipiac’s roster management policy involved setting target roster numbers for each team, which were viewed as floors by most of the women’s team coaches and as caps by most of the men’s team coaches.²¹⁶ As previously discussed, roster management policies, which have become a fairly common strategy college athletic departments use to achieve compliance with Title IX, typically involve such a combination of caps and floors.²¹⁷

There are several reasons why universities should not depend on upon roster floors in roster management policies. The strongest reason is that no one benefits when coaches are required to carry more athletes than they require and

²¹² *Id.* at 298.

²¹³ *Id.*

²¹⁴ *Id.* at 296.

²¹⁵ *Id.* at 298.

²¹⁶ *Id.* at 283-84.

²¹⁷ See Steinbach, *supra* note 137; Kasavana, *supra* note 139.

can afford.²¹⁸ Coaches faced with these difficulties may disregard the roster floor and cut players that they feel they are unable to dedicate proper attention to (or who do not contribute positively to the team due to inadequate skill level or desire). Alternatively, athletes may be dissatisfied with the experience and leave voluntarily. There was strong evidence in *Biediger* that this situation had occurred with some of the women's sports teams at Quinnipiac.²¹⁹ There was also evidence that the university's athletic department had not gone about implementing the roster management policy in a sensible fashion.²²⁰ There are, however, strategies that universities can utilize to make roster management policies work effectively, including those that incorporate an appropriate number of roster floors.²²¹

Decisions regarding how many and what sports teams a university will provide in any given year take considerable planning and forethought.²²² A great deal of effort goes into preparing facilities, purchasing equipment, scheduling practices and games, staffing, and recruiting.²²³ Further, although university athletic departments can use past and current enrollment figures as a gauge for the upcoming year, the gender composition of a student body may vary from year to year.²²⁴ Therefore, the athletic participation ratio of men to women that a university needs to achieve "substantial proportionality" is often "a moving target."²²⁵ This challenge makes roster management policies a particularly appealing option, as it allows a university to make decisions in advance about sports offerings and to make minor adjustments in target roster sizes for each team based on enrollment.²²⁶ For these reasons, it would be detrimental for a court to hold the use of roster floors to be a per se invalid means of achieving compliance with Title IX.

²¹⁸ See Steinbach, *supra* note 137.

²¹⁹ *Biediger*, 616 F. Supp. 2d at 284.

²²⁰ *Id.* at 285-86.

²²¹ See Steinbach, *supra* note 137.

²²² See, e.g., *Fact Sheet: Rutgers is Committed to a Successful and Accountable Intercollegiate Athletics Program*, RUTGERS MEDIA REL., <http://news.rutgers.edu/medrel/fact-sheets/2008/08/rutgers-is-committed-20080801>; *2006-2007 Operating Budget Executive Summary*, UNIV. OF FLA. ATHLETIC ASS'N, <http://www.uaa.ufl.edu/uaa/OPERATING-BUDGET-08-18-06.pdf>.

²²³ See, e.g., sources cited *supra* note 222.

²²⁴ See Steinbach, *supra* note 137.

²²⁵ *Id.*

²²⁶ See *id.*

CONCLUSION

This note explores the question whether an objective standard should be available to universities for assessing their compliance with Title IX in the area of collegiate athletics. It argues that an objective standard should be available and that the court in *Biediger* improperly applied a subjective analysis beyond the scope of what the OCR intended in issuing its regulations. To return to the hypothetical posed in the Introduction, it is not the proper role of the courts to examine the quality of the woman's participation on the softball team when assessing the university's compliance with Title IX under the "substantial proportionality" standard contained in the first prong of the OCR Policy Interpretation's three-part test. The important point is that the woman chose to join the team and to remain on the team throughout the season. This should indicate, for purposes of this prong, that the participation was sufficiently meaningful. Requiring a heightened showing to prove that participation is "meaningful" would result in unnecessary confusion and arbitrary decision-making. Furthermore, if the coach offered this woman a spot on the practice roster because of an obligation to comply with a roster floor, the use of such a roster floor should also be permissible as a means of complying with Title IX.

ADDENDUM

On July 21, 2010, following a bench trial held from June 21 to June 25, 2010, the District of Connecticut Court issued a decision on the merits in *Biediger v. Quinnipiac University*.²²⁷ Consistent with many of its initial findings supporting the grant of a preliminary injunction,²²⁸ the court concluded that Quinnipiac violated Title IX during the 2009-2010 academic year by failing to offer equal athletic participation opportunities for female students.²²⁹ In the opinion, the court analyzed the plaintiffs' three main arguments for why the university was not in compliance with Title IX: (1) that members of the competitive cheerleading team should not be counted as athletes under the statute; (2) that certain cross-

²²⁷ *Biediger v. Quinnipiac Univ.*, No. 3:09cv621, 2010 WL 2977043 (D. Conn. July 21, 2010).

²²⁸ *See Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277 (D. Conn. 2009).

²²⁹ *Biediger*, 2010 WL 2977043, at *1.

country, indoor track, and outdoor track athletes were improperly counted multiple times; and (3) that the university's roster management policies led to roster manipulation as well as artificially undersized men's teams and artificially oversized women's teams.²³⁰

With respect to the first argument, the court agreed that members of the cheerleading team could not be counted as athletes because that team did not qualify as a varsity sport for purposes of Title IX.²³¹ With respect to the second argument, the court agreed that some female cross-country runners had been improperly counted multiple times for their required participation on the indoor and outdoor track teams.²³² In addressing the third argument, the subject of this note, the court concluded:

Finally, although I find, as a matter of fact, that Quinnipiac is no longer engaged in the same roster manipulation that was the basis for my preliminary injunction order, the University is still continuing to deflate the size of its men's rosters and inflate the size of its women's rosters. Although that roster management is insufficient to conclude that Quinnipiac violated Title IX as a matter of law, it supports the ultimate conclusion that the University is not offering equal participation opportunities for its female students.²³³

The court noted the existence of little precedent "on judging whether an athlete's experience on a varsity team qualifies as a genuine participation opportunity—i.e., whether his or her participation opportunity is real, and not illusory."²³⁴ On this point, the court was persuaded by the government's encouragement, expressed in its amicus brief, to "look beyond [the] numbers' and examine the quality of opportunities being offered."²³⁵ An examination of the *quality* of opportunities is precisely the type of analysis this note argues should remain limited when courts evaluate Title IX compliance under the "substantial proportionality" standard.²³⁶ Nonetheless, despite

²³⁰ *Id.* at *1-2.

²³¹ *Id.* at *1.

²³² *Id.*

²³³ *Id.* at *2.

²³⁴ *Id.* at *30.

²³⁵ *Id.* (quoting Brief for the United States as Amicus Curiae at 11, *Biediger v. Quinnipiac Univ.*, No. 3:09cv621, (D. Conn. July 21, 2010)).

²³⁶ See *supra* Part IV.B.

finding that roster manipulation²³⁷ did not occur during the 2009-2010 school year, the court engaged in a detailed analysis of “whether Quinnipiac’s mandatory roster numbers are appropriately set and afford athletes genuine varsity participation opportunities.”²³⁸ After comparing the sizes of Quinnipiac’s athletic team rosters with both the conference and national averages, the court concluded that with some exceptions, Quinnipiac appeared to set its men’s team rosters relatively small and its women’s team rosters relatively large, although the differences were not dramatic.²³⁹

The *Biediger* court took a middle-of-the-road approach in addressing the plaintiffs’ argument that the university’s roster management policies resulted in too few genuine athletic participation opportunities for women. Specifically, in light of the finding that the university clearly “set its roster targets with the intent of producing statistics showing that it provides substantially proportional athletic participation opportunities for women,” the court noted that this was “not necessarily wrong.”²⁴⁰ Therefore, on its own, the evidence with respect to the university’s roster management policies did not entitle the plaintiffs to relief.²⁴¹ Nonetheless, the court noted that this evidence served two other purposes.²⁴² First, it strengthened the plaintiffs’ other argument that the university was improperly counting female cross-country runners multiple times for their required participation on the indoor and outdoor track teams.²⁴³ Further, it indicated to the court “that the University’s roster targets were carefully chosen and managed, and any shortfall in the number of Quinnipiac’s female athletes is attributable to University decision-making and not other external factors.”²⁴⁴ Therefore, the court upheld the use of roster management policies, including setting roster ceilings and floors, as a valid means of achieving Title IX compliance.²⁴⁵ In doing so, however, it seemed to suggest that a university employing a roster

²³⁷ Roster manipulation refers to the “suspicious trend of men’s teams adding players, and women’s teams dropping players, after the first date of competition.” *Biediger*, 2010 WL 2977043, at *7.

²³⁸ *Id.* at *8.

²³⁹ *Id.* at *9.

²⁴⁰ *Id.* at *45.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *See id.*

management system similar to that of Quinnipiac may be subject to enhanced scrutiny in evaluating Title IX compliance. It remains to be seen how other courts will address challenges to roster management policies under Title IX.

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